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IN THE
Supreme Court of the United States
OCTOBER TERM, 1945.
No. [REDACTED] 135

In the Matter

of

DORA WINTER,

Alleged Bankrupt.

THE CONTINENTAL BANK & TRUST COMPANY OF NEW YORK,
as Trustee, under an Indenture of Trust dated
December 8th, 1932,

Petitioning Creditor.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI.**

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**BRIEF IN OPPOSITION TO PETITION FOR
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Statement.

The petitioner, The Continental Bank & Trust Company of New York, as trustee under an indenture of trust, filed an involuntary petition in bankruptcy against Dora Winter, in the United States District Court for the Southern District of New York.

Upon the application of said Dora Winter, the involuntary petition was dismissed, and the petitioning creditor's cross-motion to amend the involuntary petition was denied. The memorandum decision of Hon-

orable William Bondy, United States District Judge, upon said applications, appears at pages 23 and 24 of the record.

The Circuit Court of Appeals, Second Circuit, in a unanimous decision by Swan, Chase and Clark, Circuit Judges, affirmed the order of the District Judge (R. 31-37). The opinion of the Circuit Court of Appeals is reported in 153 F. (2d) 397.

The Respondent Opposes the Petitioner's Application for a Writ of Certiorari on the Following Grounds:

(1) The petitioner sets forth no special and important reasons for the granting of a writ of certiorari.

(2) The Circuit Court of Appeals in no way exceeded its powers, and committed no error, in affirming the order of the District Court, which dismissed the involuntary petition in bankruptcy and refused permission to amend. Even assuming that the act of the alleged bankrupt constituted an act of bankruptcy, the involuntary petition was filed too late.

Facts.

On November 27, 1944, an involuntary petition in bankruptcy was filed, in the United States District Court for the Southern District of New York, against Dora Winter, the respondent herein, by The Continental Bank & Trust Company of New York, as trustee under an indenture of trust (R. 5, 8-10).

Upon the *ex parte* application of said petitioning creditor, an order was signed on November 28th, 1944, appointing a receiver of the property of the alleged bankrupt (R. 5, 6).

The sole acts of bankruptcy alleged in the involuntary petition, were contained in paragraph 5 thereof, which reads as follows:

"5. That upon information and belief, the said Dora Winter alleged bankrupt, within four months next preceding the filing of this petition committed an act of bankruptcy in that she did the following acts:

(a) That the said alleged bankrupt conveyed and transferred a large part of her property in 1944, with intent to hinder, delay or defraud her creditors.

(b) That the said alleged bankrupt concealed, removed or permitted to be concealed or removed her property in 1944 with intent to hinder, delay or defraud her creditors.

(c) Upon information and belief, that the alleged bankrupt while insolvent, transferred portions of her property to one or more of her creditors with intent to prefer such creditors over her other creditors" (R. 9).

An application was made promptly by the alleged bankrupt in the District Court, for an order dismissing the involuntary petition and vacating the order appointing the receiver (R. 3-4), upon the ground that the petition was fatally defective (R. 4-7).

The petitioning creditor made no attempt, on said motion, to sustain the legal sufficiency of the involuntary petition (R. 11-16). On the return date of the application to dismiss, the petitioning creditor applied to the District Court, by way of cross-motion, for leave to amend paragraph 5 of the involuntary petition (R. 11-16).

The proposed amendment is set forth at length in the petition for a writ of certiorari (pp. 2-4), and in the record (R. 12-14), and need not be repeated here.

Both the District Court (R. 23-24), and the Circuit Court of Appeals (R. 31-37), held that:

(1) The allegations in the original petition were insufficient;

(2) The proposed amendment would not cure the defects by adequately alleging an act of bankruptcy committed within four months of the filing of the petition.

The involuntary petition was therefore dismissed, and leave to amend denied.

These are the rulings petitioner seeks to bring to this Court by means of a writ of certiorari.

POINT I.

Petitioner fails to set forth special and important reasons for the granting of a writ of certiorari.

In its petition, requesting that a writ of certiorari be granted, the petitioner seeks the intervention of this Court on the following ground:

“* * * that the case calls for the exercise of this Court’s power of supervision in that the dismissal of the involuntary petition in bankruptcy with the proposed amendment has deprived petitioner of an opportunity of presenting the question of the alleged bankrupt’s fraud for adjudication” (p. 5, Petition for writ of certiorari).

The questions presented by petitioner to this Court (p. 4, Petition for writ of certiorari) are identical with those presented in the courts below.

Obviously, petitioner is merely seeking another hearing, in a higher appellate court, of the matters litigated, and considered, at length in the courts below.

Neither in its petition for a writ of certiorari, nor in its brief, does petitioner make reference to, or attempt to comply with, that portion of Rule 38 of the Rules of this Court, wherein this Court sets forth, for the guidance of petitioners, the special and important reasons for the granting of a writ of certiorari.

Examination of the relevant portions of Rule 38, will indicate that petitioner has not relied on any of the grounds set forth therein.

The Circuit Court of Appeals is not charged with having rendered a decision in conflict with the decision of another Circuit Court of Appeals, or in conflict with the decisions of this Court, or in conflict with the decisions of local courts on questions of local law.

No claim is made that the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

Nor is the Circuit Court of Appeals claimed to have so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

It is submitted that a writ of certiorari should not be granted, in this case.

As was stated by Mr. Chief Justice Taft, in *Magnum Import Co. v. De Spolurno Coty*, 262 U. S. 159 (1923):

“The jurisdiction (to bring up cases by certiorari) was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing” (262 U. S. at 163).

POINT II.

The Circuit Court of Appeals in no way exceeded its powers, and committed no error, in affirming the order of the District Court.

Even assuming that the act of the alleged bankrupt constituted an act of bankruptcy, the involuntary petition was filed too late.

The insufficiency of the allegations of the original involuntary petition was not contested by petitioner either in the District Court or in the Circuit Court of Appeals. In its present application for a writ of certiorari, petitioner, neither in its brief nor in its petition, contends that the Circuit Court of Appeals erred in holding the original involuntary petition insufficient.

The proposed amendment to the involuntary petition was the point of contention.

As was stated by the Circuit Court of Appeals:

“* * * the presently controverted issue is whether the proposed amendment would have cured the defects * * *” (R. 33).

The courts below were not presented merely with a request for permission to amend, but actually had before them the very amendment the petitioning creditor sought to make.

If the proposed amendment was also legally insufficient, it could not cure the original involuntary petition, and leave to amend had to be denied. Under these circumstances as the Circuit Court of Appeals stated:

“* * * the refusal to allow the proposed amendment was not an abuse of discretion” (R. 37).

In considering the legal sufficiency of the proposed amendment, two questions were presented:

- (a) Whether the amendment alleged an act of bankruptcy (as the original allegations did not); and
- (b) Whether the involuntary petition in bankruptcy was filed within the statutory time after the commission of the act of bankruptcy alleged in the amendment.

If either question was answered in the negative, the proposed amendment to the involuntary petition was legally insufficient.

The Circuit Court of Appeals answered the second question in the negative.

Petitioner attempted to allege two acts of bankruptcy in its amendment (R. 12-14).

The first was the execution of the waiver of the alleged bankrupt's right of election (R. 13). Whether the execution of the waiver was a fraudulent transfer was contested seriously in the courts below. However, the Circuit Court of Appeals assumed (without deciding) that the waiver was a transfer which amounted

to an act of bankruptcy (R. 34). Petitioner cannot claim to be aggrieved by such a ruling, and certainly the decision of the Circuit Court of Appeals on that point poses no basis for the issuance of a writ of certiorari.

As the second act of bankruptcy, petitioner characterized the conduct of the alleged bankrupt as constituting a "concealment" of her property (R. 14). The facts alleged, however, negative and completely dispel the unfounded characterization of a concealment.

The Circuit Court of Appeals fully analyzed the facts alleged in the amendment, and found no concealment. The Court said:

"It is clear that the execution of the waiver plus the failure of the appellee to inform the appellant that she had executed it until she so testified in supplementary proceedings, together with her failure to keep a copy of the waiver, to keep informed as to who had it and to learn that it had not been recorded are the only facts relied upon to show concealment. We think they fall short of showing a concealment of property within the meaning of Sec. 3 (a) of the Bankruptcy Act either severally or in the aggregate. At most she failed to disclose to the appellant the fact that she had executed the waiver until she was asked about it in supplementary proceedings and then she concealed nothing. The New York Law does not require the filing of such a waiver for record; there is, indeed, no provision for recording it as notice to anybody. There is no allegation that she concealed the fact that her husband died on June 16, 1944, having executed his will in the

preceding month by the terms of which he left her nothing and obviously she could not conceal what the appellant was conclusively presumed to know, viz., that under the law of New York she had the power, exercisable while her husband was living, to waive her right to take against his will.

Sec. 1 (7) of the Act provides that 'conceal', unless such construction be inconsistent with the context 'shall include secrete, falsify and mutilate.'

Property is concealed or permitted to be concealed within the meaning of those terms in the definition of the first act of bankruptcy in Sec. 3 (a) when a person does, or permits to be done, anything with intent to hinder, delay or defraud his creditors which prevents, or tends to prevent the discovery of the property. Proof of concealment, however, requires something more than a mere failure to volunteer information to creditors. *In re Shoosmith*, Cir. 7, 135 Fed. 684" (R. 36-37).

No authorities are cited by petitioner to indicate that the Circuit Court of Appeals should have held to the contrary.

Having answered the first question favorably to the petitioner, by assuming that there had been an act of bankruptcy, the Circuit Court of Appeals answered the second question in the negative:

"* * * the only possible act of bankruptcy alleged in the proposed amendment was a transfer perfected more than four months before the involuntary petition was filed" (R. 37).

This conclusion of the Circuit Court of Appeals was clearly correct, as analysis will show.

The Bankruptcy Act provides, in Section 3 thereof:

“(a) Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, removed, or permitted to be concealed or removed any part of his property, with intent to hinder, delay, or defraud his creditors or any of them; * * *.

“(b) A petition may be filed against a person within four months after the commission of an act of bankruptcy. Such time with respect to the first * * * act of bankruptcy shall not expire until four months after the date when the transfer or assignment became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred or assigned superior to the rights of the transferee or assignee therein * * *” (11 U. S. C. A., Section 21).

In the Circuit Court of Appeals, petitioner urged that the execution of the waiver of the right of election did not constitute a perfected transfer on June 13 or 14, 1944, the date of the execution thereof.

This contention, still urged by petitioner (pp. 30-32, brief in support of petition for writ of certiorari), was overruled by the Circuit Court of Appeals in the following language:

“Whether the time for filing the petition expired four months after the waiver was executed, any question of concealment aside, obviously depends upon when it became fully effective within the meaning of the above quoted part of the statute (Section 3 (b) of the Bankruptcy Act). That depends upon its effect under the New York law.

The power of a husband or wife to waive the right of election to take against the last will of the other spouse arises from Sec. 18 (9) of the New York Decedent Estate Law reading, so far as now pertinent, as follows:

‘9. The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage.’

The waiver was executed in due form during the lifetime of the alleged bankrupt and her husband. The statute required nothing more to be done to make it effective as of its date. It was beyond recall by agreement with the husband, or otherwise, after his death on June 16, 1944 which was also over five months before the petition in bankruptcy was filed and it is immaterial in this case whether the so-called ‘transfer’ took place when the waiver was executed or when the husband died. No authority has been called to our attention, and we have found none, which makes anything a condition precedent to the taking effect of such a waiver as a transfer within the bankruptcy act, if it be such a transfer, except compliance, as was here shown, with the provisions of the New York statute. Consequently any transfer by means of the waiver was perfected to the extent that it would ever be perfected more than four months before the involuntary petition was filed” (R. 34-35).

No New York authorities are cited by petitioner contrary to this rule of law, nor does petitioner even claim that the Circuit Court of Appeals rendered a decision in conflict with the decisions of the New York Courts on such a question.

No basis for the granting of a writ of certiorari is, therefore, set forth.

POINT III.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 12, 1946.

